In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-972

GEOFFREY HONNEUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly excluded proffered expert testimony concerning the different species of marihuana, and that the court erroneously restricted his cross-examination of government witnesses.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on six counts of an indictment charging him and five confederates[1] with various offenses arising out of their efforts to import and distribute marihuana, in violation of 18 U.S.C. 371 and 545, and 21 U.S.C. 841, 846, 952, and 963. Subsequently, petitioner's post-trial motion to dismiss count six (charging smuggling, in violation of 18 U.S.C. 545) was granted. Petitioner was sentenced to concurrent five-year prison terms on counts one, three,

[1]Co-defendant Arthur Davey was convicted on all counts; co-defendant Robert Billock was acquitted on all counts. Co-defendants Richard Thurlow, William Helliesen, and Richard Gray pleaded guilty prior to trial.

and five (conspiracy counts), and concurrent five-year prison terms on counts two and four (to be served consecutively to the sentence on the conspiracy counts) and was fined $5,000 on each count. The court of appeals, in a thorough opinion, affirmed, except for the sentences under counts one, three, and five, which it found to constitute a single conspiracy and as to which it remanded for resentencing (Pet. App. 30-47).

Evidence at trial established that petitioner met in April 1972 with Judith and David Dugdale and Robert Puffer and sought the services of Puffer's yacht and crew to smuggle marihuana from Jamaica into the United States. Puffer later agreed to the deal, and a fee was set (1 Tr. 14-18). In May 1972, petitioner met with Richard Thurlow, who agreed to travel with him to Jamaica and introduce him to sellers of large quantities of marihuana (1 Tr. 90-92).

That same month, the Dugdales, Puffer, and Arthur Davey provisioned Puffer's vessel at Duxbury Harbor, Massachusetts. The boat left Massachusetts on May 24, 1972, and arrived at West Palm Beach, Florida, on June 4, 1972 (1 Tr. 20-28). Davey and Thurlow came aboard the next day and designated a point off the Maine coast as the eventual off-loading site (1 Tr. 28). Following the arrival of petitioner and William Rowe, Thurlow, Rowe, Puffer, and petitioner flew to Jamaica (1 Tr. 32-34), where they made contact with marihuana wholesalers, arranged for delivery of the marihuana, and established a landing site for the boat (1 Tr. 35, 100-105). Thurlow then returned to Boston, and Puffer returned to Florida (1 Tr. 35, 108).

William Helliesen, Richard Gray, and Puffer set sail for Jamaica, arriving at Runaway Bay on June 14, 1972 (1 Tr. 36-37; 2 Tr. 19). Fifteen 75-pound sacks of marihuana and thirty 25-pound packages of marihuana were loaded aboard, and the vessel set sail with Puffer, Gray, Helliesen, and Rowe aboard (1 Tr. 37-41; 2 Tr. 19-22).

On June 28, 1972, the boat arrived at Martha's Vineyard, Massachusetts, where it put in for refueling. Puffer contacted petitioner to announce the arrival and arrange a meeting in Maine. Upon arrival at Casco Bay, Maine, the cargo was transferred to another vessel (1 Tr. 42-45; 2 Tr. 23-24).

Subsequently petitioner met with Helliesen on various occasions at which he stated that he paid Helliesen's fee from the proceeds of marihuana sales in the Boston area. Petitioner supplied marihuana to Helliesen and Puffer, representing it to be from the Jamaica trip (1 Tr. 48-50; 2 Tr. 28-33).

1. Petitioner contends that the district court erred in excluding the testimony of his expert witness that marihuana may exist in any of three distinct species of the Cannabis plant, thereby preventing him from making out as a defense the government's failure to prove the substance in question was derived from Cannabis sativa L., the plant defined as marihuana in 21 U.S.C. 802(15). Such defense has been rejected as legally irrelevant by every federal court of appeals that has considered it.

In *United States* v. *Moore*, 446 F. 2d 448, 450 (C.A. 3), certiorari denied, 406 U.S. 909, the court stated:

> Cannabis indica is the name given to Cannabis sativa L. grown in India. * * * We agree with the District Court that "Congress intended the inclusion of the indica variety within the definition of marihuana as set forth in 26 U.S.C. §4761(a)."

And in affirming the district court's denial of a defense offer to prove marihuana polytypal, the court in *United* States v. *Rothberg*, 480 F.2d 534, 536, (C.A. 2), certiorari denied, 414 U.S. 856, stated:

> The most that the proffered proof could have established was that at the time of trial there was some and perhaps growing botanical opinion that Cannabis is polytypal and that a distinction

> can be made between Cannabis Sativa L. and Cannabis Indica Lam. * * * [U]p to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana * * *. See *Leary* v. *United States*, 395 U.S. 6, 50 * * *. Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions.

Accord, *United States* v. *Kinsey*, 505 F. 2d 1354 (C.A. 2).

Other courts of appeals that have considered the issue have reached like conclusions. *United States* v. *Walton*, C.A. D.C., No. 74-1790, decided January 23, 1975; *United States* v. *Gaines*, 489 F. 2d 690 (C.A. 5); *United States* v. *Burden*, 497 F. 2d 385 (C.A. 8); *United States* v. *King*, 485 F. 2d 353 (C.A. 10).[2] The fact that certain district courts and the Superior Court for the District of Columbia have reached different conclusions does not warrant review by this Court.

2. Petitioner also claims that the trial court committed reversible error by improperly restricting the cross-examination of certain government witnesses. Defense counsel's attempt to inquire, on cross-examination of the accomplice Helliesen, a government witness, as to attempts by Helliesen to get $10,000 for keeping quiet, was prevented by the district court's ruling that the matter lay outside the scope of direct examination (2 Tr. 34-36, 127-132).

The court of appeals held that, under *Alford* v. *United States*, 282 U.S. 687, and *Smith* v. *Illinois*, 390 U.S. 129, the court should have permitted counsel to inquire

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[2]The same contention is made in the pending petition for certiorari to review a judgment of the Fifth Circuit in *Ford* v. *United States*, No. 74-838.

into the alleged bribe attempt in order to impeach the witness's credibility (Pet. App 37). It reasoned, however, that the error was harmless, since Helliesen had previously denied being involved in such improper solicitation, since the intermediary through whom he purportedly had acted, Martha Snyder, had been excused from testifying after invoking her privilege against self-incrimination, and since in any event Helliesen's testimony was strongly corroborated by other evidence and testimony in the case (Pet. App. 38-39). We believe the court of appeals was correct in its assessment of these matters and rely on its opinion (Pet. App. 36-40).

Petitioner also contends that the trial court improperly disallowed cross-examination of accomplice Thurlow as to alleged prior treatment for a nervous breakdown and admission to a Miami hospital for that reason. The evidence was properly rejected by the district court on the ground that petitioner failed to produce a hospital record or other evidence that the purported nervous breakdown was not so remote that it lacked relevance (Pet. App. 39-40), and the court of appeals correctly rejected petitioner's argument on this point (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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